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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-59

HARRAH'S CLUB,

Petitioner,

v.

RICHARD A. BERNHARD,

Respondent.

BRIEF OF THE STATE OF NEVADA, AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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INTEREST OF THE AMICUS

The Amicus, State of Nevada, has a direct interest in the matter before the Court, for the reason that the issues presented will be determinative of whether California law or Nevada law governs activities of Nevada citizens within the State of Nevada. The precise issue involves the extent to which California must give full faith and credit to Nevada decisions and statutes as they affect transactions occurring within the State of Nevada. The interest of the State of Nevada is a governmental interest arising from the obligations of state government to the citizens of the state.

ARGUMENT

The ultimate fact giving rise to the action for which certiorari is requested is that Harrah's Club, a Nevada corporation, through its employees, served alcoholic beverages to two California residents, the serving and consumption of the beverages taking place wholly within petitioner's business establishment located within the territorial limits of Nevada. Subsequent to the acts referenced above, the two California citizens returned to California and therein caused a motor vehicle accident which resulted in injury to Richard A. Bernhard, a California resident. However, if petitioner is guilty of any tortious act, such act was completed within the State of Nevada.

At the time of the events in question, neither California nor Nevada had a statute imposing civil liability on tavern keepers. Both states had statutes imposing criminal sanctions for serving obviously inebriated persons.[1] The supreme courts of both states had addressed the question of whether civil liability was imposed, either by implication from the existence of the criminal sanctions or by common-law principles. However, a direct conflict resulted from the fact that the California Supreme Court, in the case of *Vesely v. Sager*, 5 Cal.3rd 153, 486 P.2d 151 (1971), ruled that California tavern keepers were subject to civil liability arising from the act of serving obviously intoxicated persons, while the Nevada Supreme Court, in the case of *Hamm v. Carson City Nugget*, 85 Nev. 99, 450 P.2d 358 (1969), held that no such liability existed with respect to Nevada tavern keepers. Tavern keepers in Nevada were therefore possessed of the judicially-established right to pursue their business activities in Nevada free of the

[1]California Business and Professions Code § 25602; Nevada Revised Statutes 202.100 (repealed by Statutes of Nevada 1973, p. 1062).

necessity of procuring expensive liability insurance or risking ruinous exposure. This right of Nevada citizens to conduct business activities in Nevada pursuant to Nevada law was abrogated by judicial fiat of the California Supreme Court in an order of March 2, 1976.

In the March 2, 1976 decision, the California Supreme Court held that application of a test labeled the "comparative impairment test" enabled that court to determine that if the interest of California citizens are, in the court's opinion, greater than those of Nevada citizens, Nevada business entities and citizens can be compelled to comply with the "public policy" of California, notwithstanding the fact that the activities affected occur wholly within Nevada, and that Nevada law is contrary to California's policy. The California Supreme Court has, then, granted itself the power to disregard the Full Faith and Credit Clause and extend California law and "public policy" across into the State of Nevada, thereby affecting the right of Nevada citizens to pursue business activities within Nevada according to Nevada law. The fallacy of the California Supreme Court's position is patent.

Article IV, § 1 of the United States Constitution provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The only exception to the mandate of Article IV, § 1 is found in the right of a state to adopt rules of conflicts of laws, and this right must be exercised subject to Article IV, § 1 and other constitutional limitations. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 73 S.Ct. 856 (1953). In addition, the right to adopt conflict of laws rules is a right which extends only to rules having effect

within the forum state's borders and concerning affairs peculiar to the forum state. *Pink v. A.A.A. Highway Express*, 314 U.S. 201, 210, 62 S.Ct. 241, 246, 247 (1941).

The California Supreme Court has, then, rendered a decision which is clearly violative of the requirements of Article IV, § 1 and the decisions of this Court rendered with reference thereto. Moreover, the California Supreme Court has violated the foremost principle of conflicts established by this Court in *Western Union Telegraph Co. v. Brown*, 234 U.S. 542, 34 S.Ct. 955 (1914), that being, in the words of Justice Holmes, that:

> "Whatever variations of opinion there may have been, it is established as the law of this Court that when a person recovers in one jurisdiction for a tort committed in another, he does so on the grounds of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery."

The case *sub judice* presents the grave constitutional issue of what limitations restrict a state supreme court in refusing to grant full faith and credit to the laws of sister states. This issue is of extreme importance to all states of the Union, since, unless definitive guidance is forthcoming from this Court, state supreme courts, using the convenient logic of the California Supreme Court, will be free to invade sister states and, under the conflict of laws banner, impose forum state policies on such sister state's citizens. That such fear is not foundation is revealed in other recent decisions of the California Supreme Court.[2] That is to say, state supreme courts will be empowered to entirely disregard the Full Faith and Credit Clause under the guise of the conflict of laws exception to such clause.

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[2]See: *Hall v. University of Nevada*, 8 Cal.3d 143, 545 P.2d 246 (1972), wherein the California Supreme Court clearly reveals that it intends to give little or no effect to Nevada's statutory waiver of sovereign immunity or the limitations thereon, when in footnote 4 the Court states:

> "***Since we conclude that Nevada does not have immunity from liability for its activities in California, the extent to which Nevada has waived immunity by statute and the extent, if any, to which it can or has limited the statutory waiver is immaterial. Even if we assume that Nevada limited its statutory waiver of immunity to action in its courts, such limitation would not be applicable to the instant case involving activities in California because the sovereignty of one state does not extend into the territory of another."

It should also be noted that the concluding sentence in the Court's footnote is rather ironic in light of California's decision to impose its sovereignty in Nevada in the present case.

In addition, See: *Cornelison v. Chaney*, 16 Cal.3d 143, 545 P.2d 264 (1976), wherein the California Supreme Court ruled that a California superior court could properly accept jurisdiction over an action arising out of a motor vehicle accident which occurred in Nevada and which involved a Nebraska and California resident, on the ground that the Nebraska resident routinely engaged in interstate commerce in California and "the accident occurred not far from the California border, while defendant was bound for this state."

When questions arise concerning the applicability of and limitations on the Full Faith and Credit Clause, this Court is the final arbiter. *Johnson v. Muelberger*, 340 U.S. 581, 71 S.Ct. 474 (1951); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 64 S.Ct. 208 (1943). The case presently before the Court squarely presents a situation where a state court has decided a federal question of substance to all the states of the Union in a manner which directly conflicts with the Constitution of the United States and the applicable decisions of this Court. Moreover, no definitive decisions on the limits to which the conflicts of laws exception to the Full Faith and Credit Clause may be extended have been forthcoming from this Court for approximately 20 years. It is obvious from the broad and startling ramifications of the decision of the California Supreme Court that direction and clarification is now required and the petition for certiorari should be granted.

CONCLUSION

This Court is the final arbiter of issues involving the Full Faith and Credit Clause of the United States Constitution. The case *sub judice* presents a question concerning the Full Faith and Credit Clause which requires the Court to exercise its powers as arbiter in order to resolve an important conflict.

Respectfully submitted,

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